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Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

GARREY CARRUTHERS, Governor;
HAL STRATTON, Attorney General;
O. LANE MCCOTTER, Secretary of Corrections;
ROBERT TANSEY, Warden, PNM,
Petitioners,

v.

DWIGHT DURAN #26571, LONNIE DURAN #26293,
SHARON TOWERS, and all others similarly situated;
JAMES C. GIBSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether an order awarding attorneys' fees pursuant to 42 U.S.C. § 1988 for post-judgment monitoring and enforcement of an injunctive decree during a specified time period is shielded from an immediate appeal on the ground that other fee petitions, covering entirely separate time periods, are pending in the district court and are likely to be filed in the future.

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JAMES C. GIBSON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners—the Governor and other executive officials of the State of New Mexico—hereby ask this Court to grant a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit dismissing their appeal from an order directing them to pay attorneys' fees and costs relating to post-judgment monitoring and enforcement of a consent decree.[1]

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[1] The parties in the courts below were those listed in the caption or their official predecessors, plus Robert Montoya and Jose Lujan.

OPINIONS BELOW

The *per curiam* order of the United States Court of Appeals for the Tenth Circuit is unreported and is reprinted here as Appendix A. The opinion of the United States District Court for the District of New Mexico is unreported and is reprinted as Appendix B. The order of the Tenth Circuit denying rehearing and rehearing *en banc* is reprinted as Appendix C.

JURISDICTION

The order dismissing petitioners' appeal was entered by the United States Court of Appeals for the Tenth Circuit on August 27, 1987. Petitioners' timely petition for rehearing was denied on November 10, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

28 U.S.C. § 1291 states in relevant part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

STATEMENT

This case is a class action covering virtually every aspect of the services and conditions provided in medium and maximum security prisons in New Mexico. Suit was filed in 1977 and the parties in 1980 agreed to a comprehensive 206-page consent decree setting detailed standards for the operation of the then-existing Penitentiary of New Mexico as well as three later-constructed facilities. As in many cases of this breadth and complexity, the implementation of the consent decree has involved significant monitoring efforts by counsel for the plaintiffs, including various motions for contempt.[2] Petitioners—

[2] *See, e.g., Duran v. Anaya*, 642 F. Supp. 510 (D. N.M. 1986).

the defendants in this matter—have also filed several motions for modification of the decree. At present, the end of this "implementation phase" of the case is nowhere in sight.

The ruling at issue here is an order of the district court that both granted respondents' motion for attorneys' fees and costs under 42 U.S.C. § 1988 for litigation activities during July and August of 1985 and directed the State of New Mexico to pay $54,389.41. Pet. App. B. The plaintiffs had previously received several hundred thousand dollars in fees and costs in the case,[3] and the court now has under consideration requests for several hundred thousand dollars in additional compensation for activities undertaken in September-October 1985, November 1985-June 1986 and July-May 1987. During the two-month period at issue in this petition, counsel for respondents were engaged in two types of activities. First, they were continuing their usual monitoring of compliance with the decree. Second, at the request of the court, they were conducting negotiations with the defendants concerning allegations of noncompliance with the decree as well as requests for modification of the decree being contemplated by defendants. Pet. App. 4a.[4]

The district court did not rule on the fee application for this two-month period (July-August 1985) until April 28, 1987. On that date, the court awarded re-

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[3] Defendant's Response to Plaintiff's Motion And Application For Attorneys' Fees and Expenses for the Period of July and August, 1985, at 5.

[4] When these negotiations proved unsuccessful, respondents moved for contempt and petitioners filed their requests for modification. The contempt issues were later dismissed by the plaintiffs with prejudice in return for withdrawal by the defendants of some of their modification requests without prejudice, as well as creation of a committee to deal with the issue of inmate "good time" credits. The district court has yet to rule on defendants' proposed modifications.

spondents the full amount that they requested in their fee motion. Petitioners then filed a timely notice of appeal to the Tenth Circuit. They intended to argue on appeal, as they had in the district court, that the fee award as a whole was excessive and that the plaintiffs should have been required to show concrete results from their activities—at least with respect to the negotiations on noncompliance and the proposed modifications to the decree.

Before these issues could be briefed, however, respondents filed a motion to dismiss the appeal. They argued that the fee award was an unappealable "interim order" because there remained pending in the district court subsequent fee petitions covering later periods of time. They added that these later fee requests covered activities that were related to those undertaken in July and August 1985. The did not, however, suggest that the award at issue was in any sense tentative or subject to revision.

Petitioners responded to this motion by arguing that the award was both collateral to the merits of the case and "final" in the sense that it resolved fully the plaintiffs' right to fees and costs for the relevant time period. They distinguished the cases cited by the plaintiffs on the ground that they involved interim awards of fees for activities *prior* to the entry of judgment, which were subject to later modification at the time of judgment and thus arguably not sufficiently final to allow an immediate appeal. In the instant case, by contrast, the fee award came seven years after the entry of a judgment in the form of a consent decree, was not subject to modification at the time of some later "final" award and, indeed, could never be reviewed on appeal if not reviewed at this time. Respondents argued in reply that the fee award was somehow inherently subject to later modification at such time as the district court entered a "final" fee award. They did not, however, suggest how

the overall issue of petitioners' liability for post-judgment fees would ever, in the context of this case, be reconsidered in such a "final" order.

A panel of the Tenth Circuit granted the motion to dismiss on August 27, 1987. It held that the district court's ruling was not properly subject to an immediate appeal because petitioners had "not shown that this interim award is 'effectively unreviewable' after entry of the final award." Pet. App. 3a (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). In support of this proposition, the court cited its earlier ruling in *In re Callister*, 673 F.2d 305, 306-07 (10th Cir. 1982), which held that a *pre-judgment* award of fees as an administration expense in a bankruptcy case was not immediately appealable because such an award was subject to modification at the time of a final award in connection with the final judgment in the case. *See* Pet. App. 3a.

Petitioners sought a rehearing from the panel, pointing out that the court appeared to have misunderstood the factual setting of this case when it suggested that the fee award at issue could be appealed when the district court later enters a "final award." As noted above, by the nature of the post-judgment implementation process in this case, there will never be a fee ruling that is any more "final" than the present order; the district court merely considers fee requests for specified periods of time and rules on them one by one. Petitioners also suggested a need for a rehearing *en banc* in the event that the panel had accurately understood the relevant facts. They argued that the panel's treatment of this fee award as "interim" and unappealable meant, in effect, that all post-judgment awards attributable to monitoring or enforcement of previous judgments could be permanently insulated from appellate review.

On November 10, 1987, the panel denied rehearing, stating that it had reviewed petitioners' factual presenta-

tion and remained convinced that "[a]s of the date of the entry of the order appealed from, no final judgment had been entered by the district court." Pet. App. 7a (citing 28 U.S.C. § 1291). The request for rehearing *en banc* was also denied on the same date.

ARGUMENT

This case warrants review for two reasons. First, the Tenth Circuit's ruling—that post-judgment fee awards for particular periods of time during the implementation of a complex injunctive decree are not appealable until the entry of a "final" award—is clearly indefensible. It conflicts with the handling of similar appeals in at least seven other Circuits and, more fundamentally, is irreconcilable with the general principles of appealability. Second, in the absence of some action by this Court, the State of New Mexico will be left in the untenable position of being subject to numerous orders to pay hundreds of thousands of dollars in fees and costs without any realistic chance that these awards will ever become appealable. Thus, even though the ruling below is unpublished, this case is nonetheless of sufficient importance to merit review. Indeed, in light of this serious practical problem and the clarity of the legal issues raised here, we believe that this is an appropriate case for a summary reversal.

I. The Decision Below Is Plainly Incorrect.

The Tenth Circuit's ruling dismissing petitioners' appeal from a post-judgment order directing them to pay attorneys' fees and costs—an order that was neither tentative on its face nor likely ever to be reconsidered by the district court at any later date—is without any legal basis. To our knowledge, no other Circuit has followed that approach. On the other hand, at least seven Circuits, when faced with immediate appeals of post-judgment fee awards comparable to that involved here, have reached the merits of the fee award. *See Keith v. Volpe*, 833 F.2d

850 (9th Cir. 1987); *Brewster v. Dukakis*, 786 F.2d 16 (1st Cir. 1986); *Turner v. Orr*, 785 F.2d 1498 (11th Cir. 1986); *Adams v. Mathis*, 752 F.2d 553 (11th Cir. 1985); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 762 F.2d 272 (3d Cir. 1984), *aff'd in part and rev'd in part on other grounds*, 106 S. Ct. 3088 (1986), *rev'd on other grounds*, 107 S. Ct. 3078 (1987); *Willie M. v. Hunt*, 732 F.2d 383 (4th Cir. 1984); *Miller v. Carson*, 628 F.2d 346 (5th Cir. 1980); *Northcross v. Board of Educ.*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

The Eleventh Circuit's ruling in *Turner v. Orr*, *supra*, provides a good example of the prevailing rule. That case involved a consent decree aimed at curing problems of racial discrimination at a military base. The decree established a process for employees and applicants to complain of alleged violations of the decree first to a Plaintiff's Monitoring Committee and then, via the Committee, to a special master. Counsel for the Committee filed what the circuit court acknowledged was an *initial* request for post-judgment fees, 785 F.2d at 1500, which the district court awarded. The defendants appealed and the court of appeals, unlike the Tenth Circuit in this case, reviewed the award on the merits.

To be sure, in *Turner v. Orr* and most of the other cases cited above, there was no express discussion of jurisdiction.[5] The sole exception on the list is *Keith v. Volpe*, *supra*, where the Ninth Circuit explicitly found that it had "jurisdiction under 28 U.S.C. § 1291" to review fees awarded for post-judgment monitoring of an earlier consent decree. 833 F.2d at 851. It did so despite the

[5] This silence is itself telling. Because of the jurisdictional nature of finality, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), even where the parties do not contest the appealability of an order, a court is "obligated to do so on [its] own motion if a question thereto exists." *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

fact that it was clear that the fee petition in dispute was *not* the last that was to be entertained in the case. Not only had the district court begun to require quarterly fee applications from plaintiffs' attorneys, *id.* at 860 n.6, but an appeal of a separate award, for other monitoring activities, was also pending at the time, *id.* at 853 n.2.

This approach is fully supported by the rulings of this Court. As an initial matter, we note that immediate appealability of post-judgment fee awards was given at least implicit support in both *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 106 S. Ct. 3088 (1986), and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S. Ct. 3078 (1987). In each instance, the Court reviewed an award of fees for monitoring compliance with a consent decree over a discrete time period. The award, which "relate[d] only to work performed *after* entry of the consent decree," 762 F.2d at 274 (emphasis in original), had been appealed immediately to the Third Circuit, which reached the merits. This Court, like the court of appeals before it, did not question the finality of the fee order or even ask, as the Tenth Circuit did here, whether later fee petitions might be filed. Indeed, in view of the bitter and protracted history of non-compliance with the consent decree at issue in *Delaware Valley*, it seems apparent that there may be future issues that might well lead to subsequent fee awards.

More fundamentally, the prevailing rule on immediate appealability of post-judgment fee awards derives directly from the basic principles governing appealability of district court orders in general. *See generally Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). A district court order, although not the "final judgment" in a case, may nevertheless be appealed as a "final decision" under 28 U.S.C. § 1291 if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action,

and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This test fully supports jurisdiction for immediate appeals of post-judgment fee awards covering particular time periods during the implementation of injunctive decrees.

First, as the Tenth Circuit seemed to acknowledge, there can be no doubt that such a fee order is "separate from the merits of the action." This Court held in *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451, (1982), that a claim "for attorney's fees under 42 U.S.C. § 1988 raises legal issues collateral to the main cause of action" and "uniquely separable" from it.[6] Second, it is clear that such an order may have "conclusively determined" a disputed issue. Indeed, the Tenth Circuit here did not and could not find that the present order—directing immediate payment of a sum certain—was somehow tentative or that it was an issue that would later be revisited and then be subject to modification.

It does not matter, in this regard, that this is not the last fee petition in the post-judgment phase of the case. It is clear that "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). Rather, an order is

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[6] Although *White* held only that a motion for attorneys' fees was not a motion to amend a judgment under Federal Rule of Civil Procedure 59(e), its analysis clearly applies to the present issue. *See generally*, Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Court*, 69 Corn. L. Rev. 207, 221-223 (1984). Rule 59(e) only applies where a supplemental motion amends a judgment; judgments, in turn, are defined only by their appealability. *See* Fed. R. Civ. P. 54(a) (" 'Judgment' as used in these rules includes a decree and any order from which an appeal lies."). The Court in *White* held that the merits judgment is appealable without the fee issue being determined because a motion for fees does not amend the judgment on the merits. If it is to be appealable at all, therefore, a fee award arising after final judgment must be separately appealable.

final when the district court contemplates no future modification of it. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983).

In the face of these settled principles, the Tenth Circuit based its ruling on the conclusion that "[t]his order does not meet the third prong of *Coopers & Lybrand*, 437 U.S. 463. Defendants have not shown that this interim award is 'effectively unreviewable' after entry of the final award." Pet. App. 3a (citing *In re Callister*, 673 F.2d 305 (10th Cir. 1982)). This conclusion is unsupportable. We recognize, of course, that there are many types of pretrial orders that, although definitive, are not properly subject to review until the time of a final merits determination.[7] Moreover, even certain types of post-judgment orders are insulated from immediate review because they will predictably be followed by appealable orders that fully resolve the particular post-judgment dispute.[8] But this is not such a case.

To the contrary, where, as here, the district court's order has conclusively determined liability for fees related to a particular post-judgment time period, and later fee orders will involve only later time periods, it is virtually certain that review of each fee order will be foreclosed if not allowed immediately. Such later review could only be obtained if the district court were, at some point, to undertake a "global" review of its various post-judgment fee awards covering separate time periods.

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[7] *See, e.g., Richardson-Merrel, Inc. v. Koller*, 472 U.S. 424 (1985) (pretrial order dismissing counsel in civil case not separately appealable); *Flanagan v. United States*, 465 U.S. 259 (1984) (same for pretrial order in criminal case); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) (same for pretrial denial of motion to dismiss counsel in civil case).

[8] *See, e.g., Fox v. Capital Co.*, 299 U.S. 105 (1936) (post-judgment order fining party for refusal to testify); 9 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 110.14[1], at 198 (2d ed. 1987).

But, in a post-judgment context, there is no reason to anticipate some sort of "final" fee order that would extend back over many periods for which fees had previously been ordered. The district court here has never indicated any intent to undertake such a review. Moreover, it is difficult to see how the occasion for such a review would arise since, in the post-judgment context, it is seldom possible to be sure that all necessary monitoring and enforcement efforts have been completed so that the issue of overall fee liability can be conclusively determined.

In sum, the Tenth Circuit's ruling apparently rests on the mere possibility that the district court may someday reconsider its otherwise definitive fee order. But the mere fact that the court has the theoretical power to change its ruling does not preclude collateral review absent some clearer indication that such a revision is contemplated. *Moses H. Cone Memorial Hosp., supra*, 460 U.S. at 12. In a post-judgment fee context, there is no reason for believing that this will occur. Thus, once an issue is resolved by the district court, "appellate review is desirable, and cannot reasonably be left to depend upon the hazards of opportunity to appeal from some other final decision." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3916, at 610.

In light of these general principles, the numerous decisions of the courts of appeals cited above—allowing immediate appeals of fee awards for post-judgment activities during ongoing implementation of injunctions—are clearly correct. Indeed, the appropriateness of such a procedure was recognized by this Court as early as the decision in *Trustees v. Greenough*, 105 U.S. 527 (1881). *See also In re Farmers' Loan & Trust Co.*, 129 U.S. 206 (1889). There, the Court held that an award of fees and costs out of a common fund was immediately appealable even though it was clear that administration of the fund would continue for some time. 105 U.S. at 531.

The sole authority cited by the Tenth Circuit to support its departure from this body of precedent was *In re Callister*, 673 F.2d 305 (10th Cir. 1982), a case concerning a *pre*-judgment award of fees. Pet. App. 3a. As we have suggested, the relevant considerations are quite different when a district court enters an "interim" fee order prior to judgment. Finality has been made a prerequisite to appealability in order to guard against the possibility of both piecemeal review and interference by an appellate court in ongoing district court proceedings. In a pre-judgment context, these goals are often served by delaying appeals of interim orders until the entry of a final judgment.

For these reasons, it may be proper to deny immediate appeal of a fee order that, unlike the one here, is entered prior to judgment. We note, however, that the decisions of the courts of appeals even on this question are difficult to reconcile. While some Circuits appear to bar pre-judgment appeals in most or all cases,[9] at least two Circuits have authorized such appeals. In *Haitian Refugee Center v. Meese*, 791 F.2d 1489 (11th Cir. 1986), for example, the Eleventh Circuit concluded that a fee award under the Equal Access to Justice Act, which was related to successful efforts to secure an interim injunction prior to entry of a final judgment, had "finally dispose[d] of the issue of attorneys' fees for litigating the case until this point" and thus could be appealed. 791 F.2d at 1494. Likewise, in *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 2180 (1987)—a prison class action similar to the present case—the Seventh Circuit allowed an immediate appeal of a fee order related to the entry of a preliminary injunction. It reasoned that the order created a final obligation to pay and that, in such a case, the defendants

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[9] *See, e.g., Hillery v. Rushen*, 702 F.2d 848 (9th Cir. 1983) (*per curiam*); *Yakowicz v. Commonwealth of Pennsylvania*, 683 F.2d 778 (3d Cir. 1982); *Ruiz v. Estelle*, 609 F.2d 118 (5th Cir. 1980).

could not be assured of restitution of the payment if their appeal were delayed. 806 F.2d at 1317-20.

Clearly, the Tenth Circuit's dismissal of a *post*-judgment fee appeal cannot be squared with these two rulings. In any event, regardless of the correct rule governing pre-judgment orders, there is simply no argument for denying petitioners an immediate appeal in this post-judgment setting. After judgment, "[t]he policy against and the probability of piecemeal review is not as decisive a consideration . . . since the underlying dispute is already settled."[10] *United States v. Washington*, 761 F.2d 1404, 1406 (9th Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986); *see also Joseph F. Hughes & Co. v. United Plumbing & Heating, Inc.*, 390 F.2d 629, 630 (6th Cir. 1968); *Plymouth Mut. Life Ins. Co. v. Illinois Mid-Continent Life Ins. Co.*, 378 F.2d 389, 391 (3d Cir. 1967). Moreover, after judgment, concerns about interference with the trial court's consideration of the case are far less salient. *See* 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3916, at 607 (1976). Most importantly, as noted above, in a post-judgment setting like the present one, there is often no assurance that there will ever be a later event reviving a right to appeal prior orders.

II. Absent Review, Petitioners Will Be Left With No Procedure for Challenging Post-Judgment Fee Awards That They Believe are Excessive or Otherwise Unjustified.

We recognize that the decision below is not a published order and therefore under Tenth Circuit Rule 36.3 does not create a formal conflict among governing precedents in the Circuits. This fact does not, however, mean that

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[10] It is true that in the present case petitioners may ultimately be forced to bring several appeals of separate post-judgment fee awards relating to separate time periods. But this danger is entirely the result of the district court's decision to consider application for post-judgment fees and costs one at a time.

it would be appropriate for this Court to deny review here. The practical difficulties and basic unfairness created by the Tenth Circuit's erroneous ruling for petitioners—and potentially other litigants as well—require correction. In our view, the appropriate action in this situation would be a summary reversal.

There can be no doubt that the Tenth Circuit's order puts petitioners, the State of New Mexico, in an untenable position. Rather than allowing an immediate appeal from each post-judgment order to pay fees, the court of appeals has required an aggrieved party to await a "final award." Pet. App. 3a. There are two possible, but equally senseless, interpretations of this order. First, the order may mean that petitioners must hold all appeals of fee awards—potentially reaching hundreds of thousands of dollars—until such a time as the district court has made the last discrete award of fees in this case. If so, this rule is clearly unworkable. Because of the possibility of continued monitoring, contempt motions, and even the defendant's own prerogative to bring a motion to modify the injunction, any particular fee award can only be deemed the last of a series after the fact, with the hindsight that can only be gained long after the expiration of the thirty days in which an appeal can be noticed. Fed. R. App. P. 4(a). Thus, in deciding whether to appeal, petitioners would be left to guess about whether a particular award is the last one. And they would make this guess subject to the risk that an error could lead to loss of their right to challenge all fee awards previously entered.

Second, the Tenth Circuit may have been assuming that there would one day be a plenary review of all post-judgment fees by the district court—leading to a "final award" covering the entire implementation period. If so, the problem is that there is no reason to expect that this will ever occur. As noted above, the district court has never indicated any such plan. Moreover,

the court itself would have great difficulty in determining precisely when it would be appropriate to conduct such a final review of post-judgment fees. The continuing obligations imposed on petitioners will always create a potential for further litigation and therefore additional fee liability.

Because, in this context, "denial of immediate review would render impossible any review whatsoever," *United States v. Ryan*, 402 U.S. 530, 533 (1971), there is a real need for action by this Court. Indeed, under either interpretation of the Tenth Circuit's ruling, it could be years before an appeal on post-judgment fees might be had, assuming it could ever be had at all. At that point, there is the very real danger that, as a practical matter, the defendants will simply be unable to recoup payments that were made many years earlier. *Cf. Cohen*, *supra* (denial of defendant's bond motion appealable because of danger of never recovering costs of suit); *Palmer*, *supra*, 806 F.2d at 1319 (allowing appeal because of "danger . . . that the fees would disappear into insolvent hands").

For these reasons, this Court should either grant certiorari and set the case for preliminary review or, alternatively, summarily reverse the decision below. In light of the clarity of the errors in the Tenth Circuit's approach, summary reversal is the preferable disposition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 87-1755
(D.C. No. CV-77-0721JB)
(D. N.M.)

DWIGHT DURAN, #26571; LONNIE DURAN, #26293; SHARON TOWERS, and all others similarly situated; JAMES C. GIBSON,
Plaintiffs-Appellees,

v.

GARREY CARRUTHERS, Governor; HAL STRATTON, Attorney General; ED MAHR, Secretary of Corrections; CHARLES BECKNELL, Secretary of Criminal Justice; LEVI ROMERO, Warden, PNM; ROBERT MONTOYA; JOSE LUJAN,
Defendants-Appellants.

[Filed Aug. 27, 1987]

ORDER AND JUDGMENT

Before MOORE and SETH, Circuit Judges, and ALLEY, District Judge.*

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* The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.8(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

This matter is before the court on plaintiffs' motion to dismiss this appeal for lack of jurisdiction.

Defendants have appealed from an order of the district court awarding plaintiffs interim attorney's fees for work performed in monitoring a court approved consent decree during the months of July and August, 1985. *See Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986).

This court has jurisdiction only over final orders of the district court. 28 U.S.C. § 1291. However, an order may be appealable even though not final if it fits within the "collateral order doctrine." *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). To be deemed final under the collateral order doctrine and thus immediately appealable, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

Both parties admit that this order is not final. Defendants argue that it is appealable under the collateral order doctrine. The Supreme Court has held that a request for attorney's fees "raises legal issues collateral to the main cause of action—issues to which [Fed. R. Civ. P.] Rule 59(e) was never intended to apply." *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982). Contrary to defendants' arguments, however, this holding does not mean that *all* awards of attorney's fees are collateral and, therefore, immediately appealable.

This order does not meet the third prong of *Coopers & Lybrand*, 437 U.S. 463. Defendants have not shown that this interim award is "effectively unreviewable" after entry of the final award. *See in re Callister*, 673 F.2d 305 (10th Cir. 1982).

Defendants argue that this court has allowed prior appeals from an interim award of attorney's fees without questioning jurisdiction. *See Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). Defendants have misread *Ramos*. Although the plaintiffs in *Ramos* submitted a request for interim attorney's fees to the district court, appeal to this court was taken from the district court's final award.

We hold that this order does not finally determine the claim for attorney's fees and is not immediately appealable.

The appeal is DISMISSED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT
PER CURIAM

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 77-0721-JB

DWIGHT DURAN, *et al.*,
Plaintiffs,

v.

GARREY CARRUTHERS, *et al.*,
Defendants.

[Filed April 28, 1987]

ORDER

THIS MATTER having come on for consideration of Plaintiffs' Motion for an order directing the State of New Mexico to make payments to Plaintiffs' counsel in conformity with the Summary attached thereto, and the Court having reviewed the same, the Defendants' response thereto, and Plaintiffs' reply, with affidavits attached, the Court finds that a hearing thereon is unnecessary and finds as follows:

1. The Court has reviewed the affidavits of Plaintiffs' counsel in support of the professional services rendered and, further, has reviewed the services rendered and the time devoted thereto; that the activities, aimed at resolving major issues on modification of the Consent Decree as well as the monitoring required in connection with the allegations that Defendants were in non-compliance with the Consent Decree, are reasonable in time and amount.

2. Although Defendants expressed concern that the fees and expenses are unnecessary and unwarranted, Defendants have failed to specify with particularity claimed deficiencies and have made only generalized objections thereto.

3. The documentation submitted by Plaintiffs consistent with the procedures previously agreed to between the parties fully supports the claim for attorney fees.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants pay Plaintiffs' attorneys' fees and expenses for the period from July 1, 1985, through August 31, 1985, as follows:

DEATON & TWOHIG, LTD.		
Professional Services	$11,385.23	
Expenses	1,006.36	
	$12,391.59	$12,391.59
ROTHSTEIN, BAILEY, BENNETT, DALY & DONATELLI		
Professional Services	$25,125.42	
Expenses	2,019.78	
	$27,145.20	$27,145.20
PETER CUBRA		
Professional Services	$ 5,997.53	
Expenses	1,162.62	
	$ 7,160.15	$ 7,160.15
NATIONAL PRISON PROJECT		
Professional Services	$4,149.00	
Expenses	1,331.74	
	$ 5,480.74	$ 5,480.74
DWIGHT DURAN		
Professional Services	$ 2,150.13	
Expenses	61.60	
	$ 2,211.73	$ 2,211.73

DATED this 28th day of April, 1987.

/s/ [Illegible]
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM—November 10, 1987

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable Oliver Seth, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell Reece Tacha, and Honorable Bobby R. Baldock, Circuit Judges, United States Court of Appeals, and Honorable Wayne E. Alley, District Judge, United States District Court for the Western District of Oklahoma*

No. 87-1755

DWIGHT DURAN, #26571; LONNIE DURAN, #26293; SHARON TOWERS, and all others similarly situated; JAMES C. GIBSON,

Plaintiffs-Appellees,

v.

GARREY CARRUTHERS, Governor; HAL STRATTON, Attorney General; ED MAHR, Secretary of Corrections; CHARLES BECKNELL, Secretary of Criminal Justice; LEVI ROMERO, Warden, PNM; ROBERT MONTOYA; JOSE LUJAN,

Defendants-Appellants.

This matter is before the court on appellant's petition for rehearing with suggestion for rehearing en banc.

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* The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. As of the date of the entry of the order appealed from, no final judgment had been entered by the district court. *See* 28 U.S.C. § 1291. Accordingly, the petition is denied on the merits.

The petition having been denied on the merits by the panel to whom the case was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk